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IN THE

Supreme Court of the United States

October Term, 1958.

No. 72.

UNITED STATES OF AMERICA,
Appellant,

v.

GEORGE DONALD SHIREY.

On Appeal From the United States District Court for the Middle District of Pennsylvania.

BRIEF FOR APPELLEE.

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v.

GEORGE DONALD SHIREY.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA.

BRIEF FOR APPELLEE.

QUESTION PRESENTED.

Whether an information charging an offer or promise to a congressman to donate One Thousand Dollars a year to the Republican Party in consideration of the use or promise to use influence to procure a postmastership sets forth facts constituting a crime under 18 U. S. C. 214.

STATEMENT.

The information charged that appellee, in violation of 18 U. S. C. 214 on or about December 5, 1953, did wilfully "offer or promise to S. Walter Stauffer, a Member of Congress of the 19th Congressional District of Pennsylvania, to donate $1,000 a year to the Republican Party to be used as they see fit, in consideration of the use or the promise to use any influence to procure for him the appointive office, under the United States, of Postmaster of York, Pennsylvania" (R. 1). The District Court dismissed the information as not stating facts sufficient to constitute an offense under 18 U. S. C. 214 (R. 7). The court stated that the information "does not charge that the offer was to contribute to the individual named therein, a Congressman; the offer was made to the individual to contribute to the Republican Party" (R. 7). In addition, the court recognized that the "counterpart" section (18 U. S. C. 215) relating to a solicitor of an offer, specifically refers to political contributions; the court held that this indicated an intention on the part of Congress not to proscribe political contributions in 18 U. S. C. 214, that section containing no explicit provision to such effect (R. 4, 7). In its brief before this Court, the appellant now argues that the information charges an offer of a thing of value to Congressman Stauffer. This "thing of value" argument was not discussed by the court below, but is urged upon this Court by the appellant. The court below further found that the "Republican Party" is not a "person" within the terms of 18 U. S. C. 214 (R. 7).

SUMMARY OF ARGUMENT.

The information does not allege those facts essential to constitute a crime under 18 U. S. C. 214. An offer or promise to donate $1,000 a year to the Republican Party is not an offer or promise of money or a thing of value to a person, firm, or corporation. While S. Walter Stauffer is a person, the information does not allege that any money or thing of value was offered to S. Walter Stauffer. The Republican Party, to whom money was offered or promised, is not a person, firm, or corporation.

I.

The information does not charge that money was offered to S. Walter Stauffer. The alleged offer was to donate $1,000 a year to the Republican Party. This is not an offer of money to S. Walter Stauffer any more than had appellee told S. Walter Stauffer he would donate $1,000 a year to the March of Dimes Campaign.

II.

A. The information charges an offer to donate $1,000 to the Republican Party. This is an offer of money; it cannot be changed into an offer of a thing of value to S. Walter Stauffer because the words "money" and "thing of value" are used disjunctively in the statute. The information must charge either one or the other, and if it charges an offer of money, then it cannot be sustained as charging an offer of a thing of value. Furthermore, to permit an offer of money to be construed as an offer of a thing of value is to make the word "money" a superfluity in the statute for normally, money would be considered to be a thing of value. Therefore, the specification of the word "money" indicates that the words "thing of value" identify objects other than money.

B. The appellant suggests certain ways in which S. Walter Stauffer might benefit by a contribution to the Republican Party, namely, increase in stature as a result of being known as a collector of political contributions, and possible use of political contributions to benefit S. Walter Stauffer in a campaign of his own (Appellant's Brief, p. 14). The benefits contemplated by appellant could only accrue to S. Walter Stauffer if payment were made, or if the offer were known to persons other than S. Walter Stauffer. The mere offer to contribute to the Republican Party would not create those benefits. Since the information does not charge a payment or knowledge of the offer to one other than S. Walter Stauffer, there could be no thing of value to S. Walter Stauffer, even on the hypotheses set forth by the appellant.

C. S. Walter Stauffer might gain stature sometime in the future by being known as a collector of party funds, and sometime in the future funds contributed to the Republican Party might be used to further S. Walter Stauffer's election. However, these possibilities depend on facts developing after the offer is made; and indeed, depend on facts which may develop months or even years after such an offer. Furthermore, they depend on facts beyond the knowledge or control of the offeror. Such a futuristic concept of "thing of value" clearly was not within the intendment of Congress as those words are used in 18 U. S. C. 214.

D. Appellant assumes that a contribution to the Republican Party is in the very nature of things a thing of value to S. Walter Stauffer, and that the mere assertion in the information of an offer to contribute money to the Republican Party ipso facto is an assertion of an offer of a thing of value to S. Walter Stauffer. This is not so. An offer to contribute $1,000 to the Republican Party is not necessarily a thing of value to S. Walter Stauffer any more than it is a thing of value to any other person. An information, however, must set forth facts sufficient to state a

crime, not merely facts which may or may not be criminal. The facts set forth in an information must be such that if those facts, and those facts only, are proven, a crime would of necessity have been committed. The instant information falls far short of this requirement. Whether an offer to contribute $1,000 to the Republican Party is a thing of value to S. Walter Stauffer depends on facts not set forth, and not even suggested, in the information. Appellant's assumption that in the very nature of things an offer to contribute to the Republican Party is an offer of a thing of value to S. Walter Stauffer, finds no justification either in logic or in fact. The information, therefore, does not meet even the very general requirements of Fed. R. Crim. P. 7(c).

E. The appellant would give limitless meaning to the words "thing of value" as used in 18 U. S. C. 214. Indeed, under appellant's hypotheses, as appearing in its brief at page 14, anything could be a "thing of value". An offer to work hard as a postmaster, in consideration of receiving that appointment, would be just as much a thing of value to S. Walter Stauffer as would be those benefits contemplated by appellant in its brief at page 14.

However, the words "thing of value" are not limitless. They are given meaning because they are preceded by the word "money", thus providing them with a definite coloration, and they are restricted by the rule that penal statutes are to be strictly construed. Appellant's definition of "thing of value" would make meaningless the principles of ejusdem generis and the requirement that penal statutes be strictly construed.

III.

The Republican Party is not a person. A person is an "individual" by dictionary definition and by common parlance.

Furthermore, the broad meaning of "person" as set forth in 1 U. S. C. 1 is inapplicable to 18 U. S. C. 214. 1 U. S. C. 1 defines a person to include among other objects

"corporations", "firms", and "associations", unless the context indicates otherwise. Appellant contends that the Republican Party is an association, and hence, by virtue of 1 U. S. C. 1, a person. This contention is incorrect because (a) even if 1 U. S. C. 1 had not included within its definition of person the words "firm" and "corporation", the specification of particular entities in 18 U. S. C. 214 indicates an intent to exclude other entities; (b) but especially where two of the entities set forth in 18 U. S. C. 214, namely, "firm" and "corporation" are also included in the definition of "person" in 1 U. S. C. 1, there is indicated a clear intent on the part of Congress not to include other entities included within the definition of person in 1 U. S. C. 1, but not set forth in 18 U. S. C. 214. To conclude otherwise, that is, to conclude that the word "person" as used in 18 U. S. C. 214 is to have the many meanings set forth in 1 U. S. C. 1, is to render the words "firm" and "corporation" in 18 U. S. C. 214 superfluous.

In any event, the Republican Party is not an association. The Republican Party is a concept incapable of identification as an entity. The words "Republican Party" have no fixed meaning, and the concept "Republican Party" depends for its definition on the subjective criteria used by the definer. The "Republican Party" is not a national committee, a state committee, or a county committee, whose membership and purposes are more or less capable of definition. The Republican Party is an elusive concept and no more capable of being defined as an "association" than are the Dodger fans or the Yankee fans.

IV.

We are dealing with a penal statute. Penal statutes should be strictly construed, especially where, as here, the crime is malum prohibitum, and even more particularly, where the acts alleged to constitute the crime are in and of themselves desirable. The act of making a political contribution is to be encouraged; and if that act is to be pro-

scribed, regardless of the reason therefor, its proscription should be in explicit terms. Such an explicit proscription is found in 18 U. S. C. 215 where political contributions are clearly outlawed. It is not found in 18 U. S. C. 214, these two sections being in pari materia. The presence of such proscription in 18 U. S. C. 215 and its absence in 18 U. S. C. 214 indicates an intention not to proscribe political contributions under 18 U. S. C. 214. To conclude otherwise is to ignore the clear comparison between 18 U. S. C. 214 and 18 U. S. C. 215, and to read into 18 U. S. C. 214 a proscription not placed there by Congress.

ARGUMENT.

I.

THE INFORMATION DOES NOT CHARGE THAT APPELLEE OFFERED OR PROMISED MONEY TO S. WALTER STAUFFER.

S. Walter Stauffer is a person; and, therefore, if the information charges that appellee offered or promised money to S. Walter Stauffer, it states a crime under 18 U. S. C. 214. A reading of the information reveals that it does not make such a charge (R. 1). Nowhere in the information is there an assertion or even an intimation that money was offered or promised to S. Walter Stauffer. The information charges only that the appellee offered or promised money to the Republican Party.[1]

The appellant, however, characterizes 18 U. S. C. 214 as follows:

> "In short, what the statute provides is that no offer should be made to a 'person, firm, or corporation' which would induce *that* person, firm, or corporation to use influence; . . ." (Brief for appellant, p. 11).

The statute makes no such provision. 18 U. S. C. 214 specifically provides that its proscription is limited to whoever offers or promises *money to* a person, firm, or corporation. If appellant's characterization were accurate, any offer to a person, firm, or corporation inducing the use of influence would be criminal. The statute does not so provide, but limits its proscription to an offer of *money* or a *thing of value to* a person, firm, or corporation. There is no allegation in the information that money was offered or promised to S. Walter Stauffer.

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1. The appellee demonstrates in point III, *infra.*, pp. 16-19, that the Republican Party is not a person.

II.

THE INFORMATION DOES NOT CHARGE THAT THE APPELLEE OFFERED OR PROMISED A THING OF VALUE TO S. WALTER STAUFFER.

The information charges an offer or promise to donate $1,000 a year to the Republican Party to be used as they see fit. From this charge the appellant now argues that 18 U. S. C. 214 has been violated. The assumed violation is predicated on the hypothesis that the information, as drawn, asserts an offer or promise of a thing of value to S. Walter Stauffer. This "thing of value" argument is a recent nuance in this case. It is not mentioned in the opinion of the court below because it was not urged upon that court (R. 3-7). Indeed, a reading of the information suggests that the "thing of value" argument was not even contemplated by the drafter of the information. The argument is made for the first time before this Court.

The appellant's "thing of value" argument is its main position (brief for appellant, p. 10), and is bottomed on the following quotation:

> "It is obvious that it would be of great value to a congressman to be the person responsible for obtaining such substantial contributions. Indeed, the increase in party funds might well be available for a future political campaign of his own. At the very least, in the present posture of the case—upon dismissal of the information—the possibility that the offer of contributions was factually a 'thing of value' to the offeree must be taken as something provable under the information, and thus conceded" (brief for appellant, p. 14).

Based on appellant's own hypothesis, its contention that the information, by charging an offer or promise to donate $1,000 to the Republican Party, constitutes an offer or a thing of value to S. Walter Stauffer lacks merit.

A. The Offer Set Forth in the Information Is An Offer of Money and Not an Offer of a Thing of Value.

The information charges an offer to donate $1,000. This is an offer of money. The words "money" and "thing of value" are set forth disjunctively in 18 U. S. C. 214, that is, in the alternative. The disjunctive placement of "money" and "thing of value" in the statute makes it clear that where an information charges an offer to donate money, it can not thereafter be sustained as charging an offer of a "thing of value". Furthermore, the words "thing of value" have a broad connotation. Certainly, by common parlance, money is a thing of value. Since money is a thing of value, it would not have been necessary for Congress to use the word "money" in the statute unless it meant to limit the words "thing of value" to objects other than money. Such a limitation, namely, that the words "thing of value" as used in 18 U. S. C. 214 do not include money, is clear; and, therefore, when an information charges an offer to donate "money", it can not be thereafter supported by construing such information to charge an offer of a "thing of value".

B. Based on Appellant's Own Examples, the Offer in the Instant Case Could Not Be a Thing of Value to S. Walter Stauffer Unless and Until Payment Were Made, or Knowledge of Such Offer Were Conveyed to Someone Other Than S. Walter Stauffer.

The information does not allege that payment was made; but only that there was an offer to donate money. Until the money is actually paid to the Republican Party, it could not become a thing of value to S. Walter Stauffer in the manner contemplated by the appellant. Furthermore, it is not alleged in the information that anyone knew of the offer other than S. Walter Stauffer. S. Walter Stauffer's chances of re-election could not be enhanced in the manner suggested by appellant by an offer of money

to the Republican Party not consummated by payment. Also, even if the offer were consummated by payment, the money might be used for or against S. Walter Stauffer, depending on his relationship with the recipient of the funds. Finally, S. Walter Stauffer's prestige as a collector of funds would not be enhanced as suggested by the appellant by an offer to donate money to the Republican Party until that offer were made known to someone other than S. Walter Stauffer. The information is void of any assertion of payment or knowledge of the offer by one other than S. Walter Stauffer. Under such circumstances, a mere offer could not, under appellant's own hypothesis, be a thing of value to S. Walter Stauffer.

C. Whether the Offer in the Instant Case Was a Thing of Value to S. Walter Stauffer Depends on Facts Developing After the Offer, and Facts Over Which the Offeror Could Have No Knowledge or Control.

The suggested benefits accruing to S. Walter Stauffer from the offer in the instant case, as posited by the appellant, can be phrased as follows:

1. the value accruing to a congressman by being the person responsible for obtaining substantial contributions, and

2. the value accruing to a congressman as a result of the increase in party funds possibly available for a future campaign of his own.

Under these examples, whether a contribution of $1,000 to the Republican Party to use as they see fit is a thing of value to S. Walter Stauffer can not possibly be determined by facts existing at the time the offer is made, but is wholly dependent on future developments. No matter what benefit constitutes a "thing of value", the "thing of value" must be such at the time the offer is made. In the instant case, the "thing of value" accruing to Con-

gressman Stauffer might accrue to him months or even years after the offer were made, if it accrued at all. The statute of limitations could therefore run forever, for the statutory period does not begin until the crime is complete. The interpretation placed on 18 U. S. C. 214 by the appellant gives to that provision a breadth wholly unjustified by its language. To assume that Congress intended that the criminality of an act should be dependent on facts or circumstances beyond the control and knowledge of a defendant, and not even in existence at the time of the alleged criminal act, is to strain the congressional language and to attribute an arbitrary and unjustified meaning thereto.

D. The Information Does Not Set Forth Sufficient Facts to Support Appellant's Contention That an Offer of One Thousand Dollars to The Republican Party Is a Thing of Value to S. Walter Stauffer.

Fed. R. Crim. P. 7(c) provides:

> "The indictment or information shall be a plain, concise, and definite written statement of the essential facts constituting the offense charged."

The appellant, however, states "at the very least, in the present posture of the case—upon dismissal of the information—the possibility that the offer of contributions was factually a 'thing of value' to the offeree must be taken as something provable under the information, and thus conceded" (appellant's brief, p. 14). The appellant seems to assume that an offer to donate $1,000 to the Republican Party is inherently a thing of value to S. Walter Stauffer; and, therefore, the mere allegation of an offer to contribute to the Republican Party sets forth "the essential facts constituting the offense charged." This simply is not so. An offer to donate $1,000 to the Republican Party is not ipso facto or inherently a thing of value to S. Walter Stauffer any more than it is ipso facto or inherently a

thing of value to any other person. The appellant, seeking to overcome this apparent deficiency in the information, suggests in its brief that this Court should take judicial notice that S. Walter Stauffer was, at the time of the offer, a Republican Congressman (appellant's brief, p. 12, n. 2). There is no justification for this Court to take judicial knowledge of the political affiliation of anyone. But even if this Court were to take judicial notice of that fact, this does not supply the gap in the information, nor complete all the essential facts necessary for that information to charge an offense under 18 U. S. C. 214.

Congressman Stauffer may or may not be in favor with those who receive the offered contribution. If he were not, then the money contributed might be used against him, and even if he were, that is no guarantee that the money would inure to his benefit. Certainly this Court is not going to judicially notice that Stauffer is affiliated with the faction that might receive this contribution.

But even assuming that the money were to be used for the benefit of Congressman Stauffer, no assertion to that effect appears in the information. Indeed, the information states absolutely no facts from which it could be concluded that an offer to donate $1,000 to the Republican Party is a thing of value to S. Walter Stauffer. The benefits to S. Walter Stauffer contemplated by the appellant in its brief (appellant's brief, p. 14) are not set forth as facts in the information, but are simply posited as hypotheses, and indeed, hypotheses which the appellant would have to go beyond the facts set forth in the information to prove. An information must allege the essential facts constituting the offense charged. Those facts can not be supplied by the Court. The province of the Court is simply to determine whether the facts as alleged do constitute a claim. The facts set forth in this information may or may not constitute a crime, depending on whether a contribution to the Republican Party is or is not a thing of value to S. Walter Stauffer, and since there are not facts

set forth in the information clearly demonstrating that a contribution of $1,000 to the Republican Party is a thing of value to S. Walter Stauffer, the information is fatally defective.

The appellant's basic fallacy is the assumption that it is in the very nature of things that an offer of $1,000 to the Republican Party is a thing of value to a congressman. The appellee suggests on the other hand that it is not in the nature of things that an offer of $1,000 to the Republican Party is a thing of value to a congressman. The information, therefore, lacks an essential ingredient, namely, those facts necessary to constitute a crime under 18 U. S. C. 214. When one reads an information, he must be able to conclude that if the facts set forth in the information are proven, then a crime has been committed, but by reading this information, no such conclusion can be reached for additional facts must be found to exist in order that the facts alleged in the information constitute a crime. As noted above, the Court can not supply those additional facts, and also as noted above, the assumption by the appellant that a contribution to the Republican Party is inherently a thing of value to anyone other than the Republican Party finds no justification in logic or fact.

E. As Contemplated by Appellant, the "Thing of Value" Supposedly Accruing to S. Walter Stauffer Is Too Illusory to Come Within the Terms of 18 U. S. C. 214.

Admittedly, the words "thing of value" have a broad connotation, but there is no reason to believe that this connotation is limitless. Two reasons suggest themselves as a basis for its proper limitation. The first of these, as discussed hereafter, is the principle of strict construction of penal statutes. The second of these is the fact that the words "thing of value" follow the word "money" in 18 U. S. C. 214. By virtue of the principle of ejusdem

generis, the words "thing of value" are given coloration and meaning by the word "money".

But appellant would give to the words "thing of value" an unlimited meaning. Indeed, under appellant's conception of those words, an offer to work hard and diligently as a postmaster in consideration of an appointment to that job would violate 18 U. S. C. 214 for there is no reason to believe that S. Walter Stauffer would benefit in any lesser degree by being known as the appointer of good postmasters than as the appellant suggests, by being known as the collector of political contributions. Indeed, under appellant's conception, any benefit accruing to S. Walter Stauffer as a result of any act, no matter how socially desirable the act may be, would constitute a "thing of value" to S. Walter Stauffer and if offered to him in consideration of the use of his influence, would be criminal. This certainly flies in the face of the strict construction rule. Indeed, if the appellant's position were sustained, that rule would be meaningless.

III.

THE REPUBLICAN PARTY IS NOT A PERSON, AND THEREFORE AN OFFER OR PROMISE TO DONATE ONE THOUSAND DOLLARS TO THE REPUBLICAN PARTY IS NOT AN OFFER OR PROMISE OF MONEY TO A PERSON.

The word "person" is defined as follows:

> "A being characterized by conscious apprehension, rationality, and a moral sense . . . hence, an individual human being; a particular individual." Webster's New International Dictionary (2nd ed. 1957).

Certainly the Republican Party in no sense comes within such a definition. Webster's definition is consistent with common usage for by common usage the word "person" means a human being. Therefore, unless some artificial sense or meaning is ascribed to the word "person" as used

in 18 U. S. C. 214, an offer of money to the Republican Party is not an offer of money to a person.

Appellant contends that 1 U. S. C. 1, which states:

> "The words 'person' and 'whoever' include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals . . . *unless the context indicates otherwise*" (emphasis added) (appellant's brief, p. 9).

supplies such an artificial meaning to the word "person". Appellant urges that since 1 U. S. C. 1 includes within its definition of "person" (unless the context indicates otherwise), the words corporations, companies, associations, firms, partnerships, societies, and joint stock companies, and further since the Republican Party is contended to be an association within the meaning of 1 U. S. C. 1, that therefore the Republican Party is a person. This contention is incorrect for the following reasons:

The context of 18 U. S. C. 214 does indicate otherwise. 18 U. S. C. 214 proscribes an offer or promise of money to a person, firm, or corporation. If Congress had intended to superimpose the definition of person contained in 1 U. S. C. 1 onto 18 U. S. C. 214, it would not have added the words "firm" and "corporation" to 18 U. S. C. 214, because the words "firm" or "corporation" are already included within the definition of "person" as defined in 1 U. S. C. 1.

The very fact of specification of three objects, namely, person, firm, and corporation, in and of itself indicates an intent not to include objects unnamed. Congress would not have specified in 18 U. S. C. 214 some of the objects which are defined in 1 U. S. C. 1 as within the meaning of person, namely, firm and corporation, if it intended to include within the concept of person in 18 U. S. C. 214 other or all of the entities set forth in 1 U. S. C. 1 under the definition of person. The very fact of specification in 18 U. S. C. 214 seems to exclude further expansion. In

a sense this is an application of the principle expressio unius est exclusio alterius.

The instant case has, however, the additional factor that two of the objects set forth, namely, "firm" and "corporation" are two of the specific entities set forth in 1 U. S. C. 1 as possible meanings of the word "person". The word "association" is also set forth in 1 U. S. C. 1 as a further possible meaning of the word "person". Why did Congress take only two of the entities set forth in 1 U. S. C. 1 and specify them in 18 U. S. C. 214 if it intended that other objects or another object, namely, "association", should also be imposed on 18 U. S. C. 214. The answer is simple; Congress intended the word "person" as used in 18 U. S. C. 214, to have its normal meaning, namely, an individual, and not to have the expanded meaning suggested in 1 U. S. C. 1.

Chief Justice Marshall said in *Marbury v. Madison*, 1 Cranch 137, 174 (U. S. 1803):

> "Affirmative words are often, in their operation, negative of other objects than those affirmed; and in this case, a negative or exclusive sense must be given to them, or they have no operation at all.
>
> "It cannot be presumed that any clause in the constitution is intended to be without effect; and, therefore, such a construction is inadmissible, unless the words require it."

The words of Chief Justice Marshall are applied to the United States Constitution, but they are no less applicable to a statute.

Secondly, the Republican Party is not an association. The word "association" as used in 1 U. S. C. 1 is found in the sequence "corporations, companies, associations, firms, partnerships, societies, and joint stock companies." These entities all have meanings which are more or less fixed. The words "Republican Party", however, defy definition. Conceivably these words mean all registered Re-

publican voters; all who vote the straight Republican ticket; all registered Republican voters who vote the straight Republican ticket. The words could also mean those who subscribe to the political philosophy of Abraham Lincoln or Dwight Eisenhower or William. Jenner. The words could also mean registered Republicans in California, or in Missouri, or in New York. The words "Republican Party" could mean any or all of these things, but there is no reason to think that they mean one rather than another.

The Republican Party is a concept incapable of definition and certainly not definable as an "association". More particularly, it is not so definable if any credence at all is to be given to the principle of strict construction of penal statutes. The Hatch Act, 18 U. S. C. 591-612, does not even attempt to define the words "political party". It does at 18 U. S. C. 591 define "political committee"; and, indeed, if the information had charged an offer to a specific political committee such as the Republican National Committee or the Republican State Committee of Pennsylvania or the Republican County Committee of York County, Pennsylvania, it would have set forth a more or less definable object. The words "Republican Party" are suggestive of a concept rather than an entity and that concept depends for its definition on the subjective criteria used by the definer.

Appellant pounces on the words used in Judge Follmer's opinion wherein he defined a "political party" as "a body of persons associated for the purpose of promoting certain views, opinions or principles" (appellant's brief, p. 26). Simply because an undefined or undefinable body of persons is associated to promote certain undefined or undefinable views or principles hardly merits the ascription to that body of the word "association" as used in 1 U. S. C. 1. In matter of fact Judge Follmer was laboring to give some sort of meaning to words which are inherently incapable of being defined.

IV.

THE ACT OF MAKING A POLITICAL CONTRIBUTION IS A SOCIALLY DESIRABLE ONE AND IF THAT ACT IS TO BE PROSCRIBED UNDER ANY CIRCUMSTANCES, SUCH PROSCRIPTION SHOULD BE IN EXPLICIT TERMS, ESPECIALLY IN A PENAL STATUTE.

Chief Justice Marshall wrote in *United States v. Wiltberger*, 5 Wheat. 76, 95 (U. S. 1820):

> "The rule that penal laws are to be construed strictly, is perhaps not much less old than construction itself. It is founded on the tenderness of the laws for rights of individuals; and on the plain principle that the power of punishment is vested in the legislative, not the judicial department."

Mr. Justice Holmes said in *McBoyle v. United States*, 283 U. S. 25, 27 (1931) that it is "reasonable" for penal statutes to be construed to give "fair warning" of "what the law intends to do if a certain line is passed" in language "that the common world will understand." Mr. Justice Douglas affirmed the principle of strict construction in his dissenting opinion in *United States v. A. & P. Trucking Company and Hopla Trucking Company*, 27 U. S. L. Week 4029, 4030 (U. S. Dec. 9, 1958).

The principle of strict construction is peculiarly applicable to the instant case for the instant case involves a crime clearly malum prohibitum and clearly not malum in se. The New York Court of Appeals on this point has said "the citizen is entitled to an unequivocal warning before conduct on his part, which is not malum in se, can be made the occasion of a deprivation of his liberty or property." *People v. Phyfe*, 136 N. Y. 554, 559, 32 N. E. 978, 979 (1893) quoted with approval in *People v. Shakum*,[2]

2. Unanimous opinion by New York Court of Appeals presided over by Chief Judge later Justice Cardozo.

251 N. Y. 107, 114, 167 N. E. 187, 189 (1929). Not only is the crime here not malum in se, but the act of making a political contribution in and of itself is a socially desirable act and one whose proscription, if it is to be proscribed, should be made in clear and explicit language. Furthermore, the principle of strict construction is pertinent to this matter for the crime set forth in 18 U. S. C. 214 does not require as a prerequisite to its taking place that the defendant act with any particular state of mind. There is no requirement that his act be intentional, willful or malicious. The mere completion of the proscribed mechanics, regardless of the state of mind, is sufficient to construct the crime.

Moreover, the specific proscription in 18 U. S. C. 215 of the solicitation or receipt of a political contribution and the absence of a comparable proscription with regard to the offer or promise of a political contribution indicates a legislative intent that political contributions were not to be proscribed by 18 U. S. C. 214.

In the area of politics and political contributions the Congress of the United States has a peculiar expertise. This Court, of course, is aware that every United States Senator and United States Representative is a specialist or at least a practitioner of the art and science of politics. If a body so sophisticated wishes to proscribe a political contribution, it is peculiarly qualified by its background to make that expression explicit. Congress has proscribed political contributions in the Hatch Act in specific and clear terms, but more important, it has also done so in 18 U. S. C. 215 which is pari materia with 18 U. S. C. 214, both having first appeared as a single act, 44 Stat. 918 (1926), Statutes in pari materia are to be construed together. *United States v. Stewart*, 311 U. S. 60, 64 (1940). If Congress had desired to make a similar proscription in 18 U. S. C. 214, it knew well how to do so, and the fact that Congress with its political expertise did not do so indicates an in-

tention that 18 U. S. C. 214 should not be extended to penalize political contributions.

It should be recalled that the act of making a political contribution is not merely a neutral act, but is an act to be encouraged. If a penal statute is to be construed so as to make such an act criminal, no matter for what purpose it is made criminal, then such a construction must be derived from explicit and unambiguous terms. Socially desirable activities should not be permitted to carry penal penalties regardless of the purpose for which they are made criminal without language compelling such a result. The language in the instant case not only does not compel such a result, it precludes such a result.

CONCLUSION.

The judgment below should be affirmed.

Respectfully submitted,

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